

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

FREDDIE LEE FOUNTAIN §
v. § CIVIL ACTION NO. 6:11cv152
DIRECTOR, TDCJ-CID §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Petitioner Freddie Fountain, proceeding *pro se*, filed this application for the writ of habeas corpus challenging the legality of his conviction. This Court ordered that the matter be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Fountain complains of a conviction for driving while intoxicated, enhanced to a second-degree felony, for which he received a sentence of 12 years in prison. He took a direct appeal, complaining that the trial court failed to sentence him to a substance abuse felony punishment facility as a condition of community supervision. The Court of Appeals held that Fountain had failed to preserve this claim for appellate review, and so his appeal was dismissed. Fountain did not seek discretionary review, but did file a state habeas corpus application raising seven grounds for relief. This application was denied without written order by the Texas Court of Criminal Appeals.

In his federal petition, Fountain raised five grounds for relief, including claims that he was coerced into pleading guilty by a threat that the District Attorney was going to falsify evidence in the case, his trial attorney Brent Wilder did not withdraw the guilty plea within 30 days

but instead took it upon himself to appeal the judgment and conviction, appellate counsel Ebb Mobley did not consult with Fountain before appealing, and took the appeal on the grounds he wanted to pursue instead of those which Fountain wanted to raise, the appellate court would not listen to him when he tried to complain about what Mobley was doing, and another attorney, Jeffrey Clark, had been appointed to represent Fountain in the case, but never did so, nor did he ever withdraw or was relieved, which deprived Fountain of his right to be represented by Clark.

The Magistrate Judge ordered the Respondent to answer the petition. In this answer, the Respondent argues that the latter two grounds raised by Fountain were not presented in the state habeas corpus proceedings and are thus procedurally defaulted, and that all of Fountain's claims lack merit. Fountain did not file a response to the answer.

After review of the pleadings and the state court records, the Magistrate Judge issued a Report recommending that Fountain's petition for habeas corpus relief be denied. The Magistrate Judge discussed each of Fountain's claims and determined that none of them contained any merit, and that the last two claims which he raised had been procedurally defaulted through Fountain's failure to raise them in the state court proceedings. The Magistrate Judge also determined that Fountain should be denied a certificate of appealability *sua sponte*.

A copy of the Magistrate Judge's Report was sent to Fountain at his last known address, return receipt requested, but no objections have been received; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings in this cause and the Report of the Magistrate Judge. Upon such review, the Court has determined that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge (docket no. 16) is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus is hereby DISMISSED with prejudice. It is further

ORDERED that the Petitioner Freddie Lee Fountain is hereby DENIED a certificate of appealability *sua sponte*. Finally, it is

ORDERED that any and all other motions which may be pending in this civil action are hereby DENIED.

So ORDERED and SIGNED this 17th day of February, 2012.

A handwritten signature in black ink, appearing to read "LEONARD DAVIS". The signature is fluid and cursive, with a large loop at the top and a horizontal line extending from the bottom right.

**LEONARD DAVIS
UNITED STATES DISTRICT JUDGE**